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# Entrepreneurs of punishment

The legacy of privatization

MALCOLM M. FEELEY

*University of California at Berkeley, USA*

## Abstract

Privatization of corrections is problematic in large part because advocates claim that private contractors can provide the same or better services at less cost than public agencies. This article argues that there is another, even more important issue: privatization is fostered by entrepreneurs who do much more than provide alternative sources of services; they create demand for and then supply new forms of social control. Indeed, the history of modern criminal justice is to some extent the history of the success of entrepreneurs in generating new or significantly expanded forms of social control. The article examines the history of entrepreneurs in establishing transportation in the 18th century and the modern prison in the 19th, and then draws parallels to contemporary efforts to provide private prisons, 'community-based' juvenile facilities, and electronic monitoring programs.

## Key Words

corrections • electronic monitoring • net-widening prisons • privatization • transportation

## INTRODUCTION: THE THESIS STATED

Advocates of privatization argue that private contractors are more efficient, more effective, and more responsive to consumer needs than governmental agencies, and that consequently they should be used whenever practical. They propose to reduce public functions to the core, and divest the state of responsibilities that are not crucial to its functioning (Osborne and Gaebler, 1992). Available evidence suggests that these champions of privatization are probably correct. There is mounting evidence from many sources that private contractors do provide services at the same or improved levels and at lower costs (Savas, 1987; MacDonald, 1990, 1992; Logan, 1996; Thomas, 1997).<sup>1</sup>

Despite this, the issue of privatizing segments of the criminal justice system remains controversial. Some critics of private prisons challenge the claim of cost savings, and

argue that many of the costs of private contracting are hidden, or that private correctional programs skim off the more manageable prisoners (Ryan and Ward, 1989), or are mired in conflicts of interest (Mobley and Geis, 2001). Others argue that punishment is a quintessential function of government, and should not under normal circumstances be delegated to private contractors. To do so, they warn, impoverishes the public sphere and weakens the moral bond between citizen and state (DiIulio, 1988). Still others argue that privatization of punishment is not really private at all, since contractors are (or should be) so circumscribed by public obligations that they are in effect agents of the state in only slightly different guise (Robbins, 1988). And conversely, others argue that prison privatization is an attempt by the state to evade some of its core responsibilities by limiting its liabilities (DiIulio, 1988). Whatever their different emphases, what these critics share in common is the belief that privatization is irresponsible.<sup>2</sup>

Such debates about the efficiency and the propriety of private prisons are important. They raise crucial questions that need to be addressed before any decision about privatization can be taken. Yet, these are not the only – or in my view, even the most important – questions one might ask about the move to privatize criminal justice functions. In this article I present what might be called a policy history of privatization in criminal justice. By tracing developments over the long term and contrasting correctional programs from different eras, I hope to identify what Rothman and Wheeler have suggested may be ‘broad trends and recurring patterns that might not be so obvious by just examining a single issue or the current policy debate’ (1981: 2). Although I do think that privatization has wide-ranging implications for all facets of the criminal justice system (Rusche and Kirchheimer, 1968 [1939]; Shearing and Stenning, 1983), my concern here is limited: I focus on privatization in Anglo-American criminal justice systems and principally on penal policies. I do not examine privatization of governmental functions generally, or even other important aspects of criminal justice privatization (e.g. private policing), although there are obvious connections. Nor is this a conventional narrative history; the aim of policy history is to identify underlying connections between what might seem to be diverse practices in order to reveal their commonality.

#### **THE THESIS ELABORATED: THE EXPANSION OF SOCIAL CONTROL**

Privatization is promoted as a way of reducing the scope of government activities, yet privatized penal policies have had precisely the opposite effect. When successful, private efforts have increased not decreased the reach of government. In the long run they have expanded, not contracted public social control. They have increased not decreased governmental expenditures. They have had this expansive effect because they have encouraged entrepreneurs to develop new forms of sanctioning, which has drawn the state ever more deeply into the management of social control. In effect they have created vast numbers of government-franchised social control centers. Ironically, in the name of shrinking government, privatization – at least in criminal justice – has expanded both the functions of the state and the costs of government. Moreover, it has done so in ways that make these functions less accountable and the costs less visible. This development has taken place largely unnoticed, or if noticed, with little self-consciousness reflection. Hence my concern: the most distinctive impact of the involvement of private contractors

in the administration of criminal justice is that they have expanded not contracted the government's capacity to effect social control.

Although private contractors may be more efficient than public agencies, as I will show, privatization also unleashes entrepreneurial energies that, at least in the criminal justice arena in the United States, Great Britain, and Australia, have led to the establishment of new and more expansive forms of social control. Typically after a period of successful private entrepreneurial innovation, the state has assumed responsibility for administering these new forms of control. This is a recurring and seemingly inevitable consequence of the involvement of contractors in Anglo-American criminal justice systems: it occurred in early 18th-century England with the rise of the modern system of criminal prosecution and with the institutionalization of North American transportation, and as convicts began to be shipped to Australia. It is found again with the birth of the modern English and American prison. And, I suggest, it is a dynamic repeating itself today, as new forms of confinement for criminal offenders are established, as 'community-based' custodial facilities for juveniles facilities expand, and as probation departments embrace electronic monitoring.<sup>3</sup>

#### **THE SOCIAL BASIS OF CRIMINAL JUSTICE PRIVATIZATION: WEAK STATES, STRONG MARKETS, AND THE ADVERSARY PROCESS**

An entrepreneurial spirit is a distinct feature of Anglo-American criminal justice systems. It is supported by three factors: the weak state in most common law countries; the fragmented nature of the adversary process itself; and the embrace of a market system that is implicit in both. Anglo-American political tradition embraces the idea of the weak, reactive state; similarly, the theory of the adversary process grants limited roles for participants in the criminal process, assuming that truth is a by-product of the clash of competing interests (Damaska, 1986). Adjudication in the adversary system is party – and not judge – driven; what one or the other party fails to present, the judge cannot consider. As Miriam Damaska has noted, the weak, reactive state and the adversary process share much in common. Both are reactive. Both embrace a quest for 'conflict resolution' rather than 'justice'. Neither seeks what Damaska characterizes as a quest for 'policy implementation'. Both seek to disperse power. Anglo-American political systems guard against abuse through fragmentation: decentralization, federalism, separation of powers, and the like. Similarly, the adversary system seeks to protect against the abuse of power by creating well-defined roles, establishing restrictive procedural rules, and defining the judge as a passive umpire. More generally, pluralist democratic theory celebrates the 'clash of enlightened self-interest' which it expects will produce the most appropriate social policies. Belief in the genius of the market underlies the rationale for both the theory of the liberal state and the theory of the adversary process. However as Robert Kagan has recently shown, 'adversarial legalism' is both an expensive and inefficient way of resolving conflicts and formulating policy since it allows issues (and costs) to spiral out of control (Kagan, 2001). Much the same may be said of privatization of corrections.

One must not press these comparisons too far. Pluralist democratic theory is dynamic; it anticipates that new interests will organize and press their agendas and make themselves felt, just as shifts in demand and supply will lead to adjustments in the market.

In contrast the theory of the adversary process is static. Roles are prescribed in a formal division of labor, and parties are constrained by restrictive procedures. Still, the theory highlights distinctive features of the Anglo-American legal system.

The theory celebrates competitions and fragmentation. In the United States, there is no ministry of justice, no criminal justice czar, no one to see that everything works as it should, and in England those charged with overseeing criminal justice matters have far less authority than their counterparts in Europe. The Anglo-American judge at trial is an umpire in a competition where each party seeks to win, not an investigator in pursuit of the truth. In the Anglo-American legal system, no one is in charge. Like the theory of the market, adversary theory relies on the belief that the clash of limited, partisan interests will produce the best outcomes. But unlike the economic market, the legal system is closed. Roles are well defined, there is little room for change. It is a situation in which innovation is likely to be introduced from the outside (Feeley, 1983).

One illustration of this is to note that Anglo-American criminal justice systems have no research and development (R&D) units, and possess no incentives to establish them. Indeed, there is no Anglo-American equivalent of the European ministries of justice. No agency, no office, no official is charged with thinking about the system as a whole or developing new and improved ways to do things. I appreciate that this varies among states with adversarial systems – American federalism and decentralization is a more extreme case than Great Britain, with its unitary system and Home Office. Still, both pale in comparison to more centralized continental systems, with their well-developed oversight functions.

This difference, I believe, goes a long way toward explaining why private contractors have been such important sources of innovation in Anglo-American criminal justice. Contractors often perform R&D functions in systems that lack their own capacity of plan. They emerge when there is failure in the market-like operations of the system. This R&D function is not an occasional or marginal byproduct of other activities; it is an enduring, important, and distinct feature of the Anglo-American criminal process. Private policy entrepreneurs have long played an important role in bringing about changes and expanding the reach of the criminal process. Historically, entrepreneurs may have been the single most important source of innovation in these systems.<sup>4</sup> As I argue below, many – perhaps most – new forms of punishment in modern Anglo-American jurisdictions have their origins in proposals of private entrepreneurs.

I do not mean to claim that the modern Anglo-American criminal justice system is somehow 'private'. Nor do I mean to suggest that governments have always been passive purchasers of 'new' ideas invented by contractors. But I do want to emphasize that historically weak states (in contrast to stronger states on the Continent) with adversary systems have relied heavily on private initiative, and that many now taken-for-granted institutions in the criminal process were originally promoted by contractors.

As with supply and demand generally, it is impossible to sort out which came first, supply in the form of a new idea or demand stemming from a new need. No doubt here, as elsewhere, the two are inextricably bound up together in ways that preclude causal analysis. The excursion into policy history that follows does not aim to provide a complete account of this complex development, but it does seek to locate the development of penal practices in an historical context that reveals continuities across time and place.

The 'new institutionalization' in law and the social sciences holds that some practices in organizations are in part a consequence of deeply embedded structures, unarticulated and unacknowledged traditions, and norms that are part of the taken-for-granted conditions of institutional life, rather than the consequence of intention and rational calculation. Such may be the case with the role of private entrepreneurs who throughout the history of the modern Anglo-American criminal justice system have succeeded in generating innovations that eventually have been embraced by the state and become part of its taken-for-granted landscape. For instance, money bail has become such an integral feature of the criminal process that its private nature is all but invisible. Similarly, although they house only a tiny portion of all inmates, private prisons in the United States are highly controversial; in contrast, private facilities for juveniles go virtually unnoticed, although they house half or more of all juveniles in custody in the United States.

### THE THESIS EXPLORED IN HISTORY: THE ROLE OF ENTREPRENEURS IN DEVELOPING THE MODERN CRIMINAL JUSTICE SYSTEM

In their classic book, *Punishment and social structure*, Rusche and Kirchheimer (1939; see also Melossi and Pavarini, 1981), argue that the nature and forms of punishment are a function of the labor market. Prisons, they argue, are retention centers for surplus labor, and shifting forms of punishment reflect changing needs for the least skilled labor – slave-labor in some societies, agricultural workers in others, and the proletariat in still others. Their analysis is an ambitious but crude explanation of the functions of criminal justice systems. In contrast, the argument outlined here is modest. It highlights a little-appreciated feature of the role of entrepreneurs in establishing the modern Anglo-American penal system, and connects it with contemporary developments in order to reveal continuities and an underlying dynamic of the Anglo-American criminal justice system.

There is a large library of impressive scholarship on the history of criminal justice in 18th- and early 19th-century England, far too much even to acknowledge here. Indeed this history is an oft and well-told story. Much of this literature recounts the development of the several components of the modern criminal justice system, relating it to broader social and political changes (Radzinowicz, 1948–86). This history tells the story of the transformation of an inept arrangement administered by amateurs into the modern, professionalized criminal justice system familiar to us today. This account of course has its parallels in other areas as well – public education, hospitals, public health, social welfare, and the like – as the modern state with its multiplicity of functions and its professional civil service helped to usher in a new era (Webb and Webb, 1922, 1927, 1929; Garland, 1985). As the last remnants of governance by the landed elite gave way to the new commercial and industrial elite, the nature of government underwent revolutionary changes. And so too did the administration of criminal justice. The seemingly bumbling inefficiencies of the aristocracy and landed gentry who staffed the judiciary and held other higher offices without compensation gave way to the desires of the growing new commercial class for practical and more efficient governmental institutions (but see Hay, 1975). Public offices were no longer treated as honorific posts or volunteer activities

of civic-minded patricians, but technical activities to be performed by trained professionals employed full time by the state.

Reforms in the criminal justice system in 18th- and early 19th-century England paralleled, and perhaps led, this transformation into the modern state. In a series of halting but inexorable steps taken over a 100-year period, between the mid-18th and mid-19th centuries, the English criminal justice system was entirely reshaped. A full-time, professional police corps was established. Full-time, law-trained, compensated judges and clerks came to supplement or replace part-time lay judges in courts handling serious cases. The role of lawyers expanded. A professional bar emerged, and prosecutors were drawn from its ranks and retained at public expense. The rules of criminal law, procedure, and evidence were refined and systematically applied. The modern prison was established; transportation and the death penalty gave way to a system of graduated prison terms, thus inviting still more prosecutions and assuring still greater likelihood of conviction. In short, the modern criminal process, capable of systematically and routinely dealing with large numbers of people, took form. A large library of research recounts these developments in England, developments that for the most part had taken place much earlier on the Continent (Langbein, 1974; Spierenburg, 1991).

However, the specific role of entrepreneurs animated by a quest for profits in this transformation has not been sufficiently explored or appreciated. Criminal law was separated from torts and made an offense against the Crown in the Middle Ages, but most features of the administration of criminal justice still remained in private hands until well into the 18th century and in some cases well beyond. As the rising new business elite demanded more efficient and more effective criminal justice administration, it is not surprising that entrepreneurs responded. Some of them developed and effected plans to improve the criminal justice system. Indeed, entrepreneurs, seeking profit from public service, played a pivotal role in reshaping criminal justice into its modern form recognizable today. The nature and form of such involvement varied by function, but developments in the criminal process mirrored commercial and industrial developments in society generally.

One of the earliest and perhaps the most successful innovation was the development of transporting convicts to North America and then later Australia. Transportation dramatically expanded the reach and impact of the criminal process, and in turn exerted pressure to expand the capacities of the other components of the criminal process. Still other new practices administered privately also had an impact. Privately organized prosecution associations sprung up in the mid-18th century, to foster more efficient apprehension and prosecution of offenders (King, 1989; Philips, 1989). Some of them were no doubt fostered by lawyers seeking to expand their business. A campaign, beginning in the late 18th century, to build prisons in which contractors would exploit prisoners' labor to reduce or off-set public cost, helped make the idea of the prison palatable. At a time when the very idea of prisons could arouse deep resentment, the claim that they could be run as businesses by private contractors at no or little cost to the state helped soften opposition.

In the discussion that follows, some of these developments are examined in ways that highlight the role of entrepreneurs and the impact their innovations had on criminal justice administration. My purpose is two-fold: to show how entrepreneurs were

instrumental in effecting new penal institutions, and to show how these new institutions, although at times characterized as 'alternatives' to existing arrangements, in fact considerably expanded the state's punitive reach. Indeed, they constituted revolutionary new forms of social control. What holds for these developments in the 18th and 19th centuries holds for contemporary developments as well. These developments are examined in the last section.

## TRANSPORTATION

Beginning in the 17th century, merchant shippers pioneered in the development of transportation as a form of punishment. Once institutionalized, transportation remained a standard form of punishment for well over 200 years (Smith, 1965; Ekirch, 1987); for half or more of this period, it constituted the single most significant sentence for serious offenders. Its appeal was instant and obvious; at no or little cost to the state, shippers would transport felons to North America. They would make their profit in the middle Atlantic colonies by selling their human cargo into a form of limited-term slavery to tobacco and cotton farmers who were desperate for labor. This system remained popular and profitable up to the American Revolution, at which time it was suspended. The suspension and eventual end of North American transportation set off a scramble to find a suitable alternative location, and for the first time to serious consideration of large-scale domestic prisons. After a period of experimentation with sites in Canada, the West Indies, and Africa, and stopgap measures with the hulks, large-scale transportation resumed to Australia. But it took a radically different form. North American transportation was virtually cost-free to the state; the Australian experience was expensive. Convicts were the first settlers on that 'fatal shore', and during the first few years shipping, settling and maintaining them were financed and managed by the state at a huge cost (Hughes, 1987). Still, the North American experience was testimony that transportation could succeed.

As opposition to transportation increased and support for domestic incarceration grew, transportation ground to a halt. But by its end, tens of thousands of convicts had been transported, first to the North American colonies and then to Australia. Transportation had existed as a state-sanctioned punishment for well over 250 years, and one of its primary forms – perhaps the primary form – of punishment for serious offenders for nearly 150 of these years. For the first half of this period, it was established, managed, and staffed by private entrepreneurs at little or no cost to the state. And even the quest during the second period was animated, at least initially, by the desire to eventually replicate the success of the North American experience. The system of North American transportation is described in more detail below.

The earliest recorded instance of transportation serving as punishment in England took place in 1607. Court records reveal that a convicted felon sentenced to death successfully petitioned the Crown for a pardon on the condition that he be transported to the American colonies. For the next hundred years courts regularly supported requests for pardons conditioned upon transportation, and although never formalized by law, transportation was institutionalized and used with great frequency. Finally with the Transportation Act of 1718, Parliament granted judges authority to sentence offenders to transportation directly, thereby circumventing the cumbersome but regularized

practice of imposing it as a condition of a pardon issued by the Crown (Feeley, 1991, 1999).

Throughout the 17th century, pardons were restricted to felons who were well-enough connected, knowledgeable enough to ask, and sympathetic enough to be taken seriously to request a judge to support their petition to the Crown requesting a pardon on condition that they would agree to be transported overseas. If successful, petitioners would then pay their own ways abroad (almost always to North America) or agree to a term of indentured servitude, and have their passage paid by a sponsor. As it expanded, shipping merchants organized the practice. Seeing the demand for labor in cotton and tobacco plantations in the mid-Atlantic colonies and the growing crime problem at home, they agreed to transport pardoned offenders at no or low cost in exchange for the right to auction them off into limited-term slavery once they reached Chesapeake Bay. This system operated on an ad hoc basis throughout the 17th century, but after the 1718 Act, shippers eventually obtained contracts with the Home Office, agreeing to take all those sentenced to be sent to North America. So established, for the next 125 years, transportation – to North America until the Revolution, and then after a brief hiatus, to Australia – was by far the most common sentence for serious offenders handed out by the courts (Beattie, 1986; Feeley, 1999).

The magnitude and significance of this new form of sanctioning has been largely overlooked in the history of English criminal justice. Or when it has been considered, its significance has been under-stated. Some histories hold that transportation was an important progressive step forward because it was an alternative to capital punishment. Others view it as a historical curiosity, a brief interim effort. In fact this innovation revolutionized English criminal justice administration (Beattie, 1986; Ekirch, 1987). For the first time, the state had the will and the means to impose severe and sustained penalties short of death on a routine and massive scale.

A careful analysis of sentences actually administered by 18th-century courts reveals that it was much more than a replacement for the gallows (Feeley, 1999). Although in early modern England, the penalty of death continued to be imposed on those convicted of the most serious felonies, throughout the 17th century the numbers of actual executions declined precipitously as the use of royal pardons, benefit of clergy and other acts of mercy expanded. At the beginning of the 17th century, the numbers of felons actually executed in England each year was in the hundreds. By the end of the century it was reduced to a few dozen. Long before transportation developed into a routine punishment for large numbers of offenders, the numbers of executions annually had dwindled still further. At best transportation was an alternative to the gallows for only a tiny number of offenders.<sup>5</sup> Almost all of those who would have been executed in the years immediately before the Act of 1718, would still have been executed after. Transportation must be understood on its own terms; it was a potent new sanction, and it was imposed overwhelmingly on those who previously would have been punished less *not* more severely, or would have escaped formal punishment altogether.

Indeed, North American transportation constituted an awesome expansion of the state's capacity to impose severe sanctions. It increased 10- or 15- or more-fold the numbers of those receiving substantial sanctions. Indeed, perhaps more than any other single new practice, it set the agenda for criminal justice reform for the next 150 years. The genius of this initial innovation rests almost entirely on the fact that it was an

innovation devised by entrepreneurs and that it cost the state virtually nothing. It is simply a misreading of history to argue, as some do, that transportation emerged as an alternative to the gallows (Feeley, 1999).

After the American Revolution put an end to transportation, English officials experimented with locations elsewhere, and approved a holding action with the hulks. Eventually they settled on transporting convicts to Australia. However, this new scheme was quite different from the one it replaced. During its last decade of operation, North American transportation was so lucrative that the Home Office had eliminated the subsidy it paid shippers, so that at its end the policy was nearly cost-free.<sup>6</sup> In contrast, Australian convicts were the vanguard in an expensive experiment in government-sponsored colonization. British naval vessels, not merchant ships, carried the first convicts to Botany Bay, and once there British officials not yeomen farmers were responsible for maintaining them. A principal aim of Australian settlement was to establish an English presence in the region to off-set the growing French presence in the South Sea lanes. Once the colony became established, some convicts were leased to farmers and manufacturers, but this was never a significant part of the Australian experience. Eventually, as the numbers of free settlers increased, colonists sought to shed the image of a convict colony, and by the 1850s were successful in ending the practice. But by this time, however, the prison had taken firm hold in England and transportation had become an anachronism.

North American transportation is typically treated as a curious and short-lived episode in English criminal justice history.<sup>7</sup> Transportation to Australia, though treated more seriously, is often presented as a dreadful but colorful chapter in the history of that continent's colonization rather than an integral part of English penal policy. This is a mistake. Transportation was a significant feature of English penal policy for over two centuries, and constituted its most significant form of serious sanctioning for half this period. It operated as the dominant form of severe sanctioning for a period longer than the modern prison has existed. Moreover, transportation unleashed expectations to expand the capacities of other criminal justice institutions, and thus set in motion the movement to reform the entire criminal process. And it was, I emphasize, a policy that for a good portion of the time cost the state very little or nothing at all.

## ORIGINS OF THE MODERN ENGLISH AND AMERICAN PRISON

Gaols and prisons have existed since at least the Middle Ages, but until the late 18th century, in England and North America, they were used primarily to hold pre-trial detainees. Scattered across the country, gaols were often nothing more than basements in public houses, and paid for by fees from local government and the prisoners themselves. In larger towns and cities, beginning in the 16th century, a variety of other institutions – workhouses, bridewells, houses of correction, asylums – were constructed to house petty offenses, vagabonds, the mentally unstable, and debtors (Spierenburg, 1991). But neither were they intended for long-term confinement of serious offenders. Indeed, until the late 18th century, few people in England and North America even envisioned lengthy imprisonment as a standard form of punishment. The large-scale prison *designed* to confine inmates for prolonged periods of time was a product of the imagination of the late 18th century.<sup>8</sup>

In England, the proximate cause of the establishment of the modern prison was the crisis precipitated by the sudden end of North American transportation. As suggested above, prototypes of the prison had existed for centuries. But the idea of incarcerating criminal offenders for very long periods did not enter the popular imagination and was not seriously debated until the demise of North American transportation. However, within 50 years, the prison was so well inscribed in public imagination and so well established on the landscape, that it was impossible to envision criminal punishment in its absence. The prison had become synonymous with punishment.

The prison took root for two reasons, one well known and the other not. The well-known and dominant explanation is that the prison represented the culmination of the Enlightenment project as applied to penology. It represented a humane and measured response to crime, a great advance over the personalistic, capricious, and cruel practices it replaced (Radzinowicz, 1956; but see Hay, 1975). It represented rationality, systematic planning, part of the modernizing project, along with improvements in prosecution, adjudication, and a professional police force (Radzinowicz, 1968). The general account of this development is not in serious dispute. However, there are vigorous disagreements of interpretation. Some see the prison as the triumph of liberalism (Radzinowicz, 1968; Rothman, 1971). Others, rejecting the idea of progress, see it as a new and insidious form of discipline (Foucault, 1975). And still others regard it as a natural consequence of the emergence of the modern welfare state (Garland, 1985). Despite these differences, most would probably agree with David Rothman's claim, admittedly wrenched out of context here, that once established, conscience gave way to convenience.

However, the oft-told story of conscience is only a partial account of the birth of the prison. Another group of reformers with a somewhat different agenda also promoted the idea of the modern prison. They too were there at the outset. And, they too played a major – perhaps decisive – role in the state's decision to embrace the prison as the punishment of choice for serious offenses. If the moral reformers were motivated primarily by conscience, as the name they selected for the prison – the penitentiary – implies, it might be said that this second group – also present at the outset – was motivated by convenience, or perhaps more properly the marriage of conscience and convenience.

Although they too justified their schemes in idealistic terms, their distinct contribution was to show how convenience could be combined with conscience. Their appeal was that they believed that prison could be self-financing and self-sustaining. They believed that the prison, like transportation, could also be a business, a manufactory, run by contractors at no or low cost and perhaps even at a small profit to the state. The proponents of this form of prison were not only disinterested reformers intent on effecting their ideas; some planned to manage this new venture themselves. Just as shippers had done much to promote and then institutionalize the idea of transportation as a form of punishment at the outset of the century, near century's end, another group promoted the idea of prisons, for the same sorts of reasons and with the same sorts of arguments. Their plans took a variety of forms: locating craft work and manufacturing enterprises inside prisons, sending felons to private prison contractors who would maintain them and exploit their labor, employing prison labor on public works projects, leasing convicts to private contractors, and the like.<sup>9</sup>

The particular forms that prison development took in England and the United States

are the result of three interrelated factors: (1) the meager capacity of the state in late 18th-century England and North America, and thus the need to rely on private contractors for all sorts of public services; (2) the earlier success of transportation and the more immediate experience with the hulks, which served as an inspiration for no- or low-cost prisons; and (3) the rise of the factory, which served as an important model for the modern prison.

The idea of private prisons or prisons run by contractors who exploited the labor of convicts was a natural outgrowth of the experience with North American transportation. By any account transportation had been an overwhelming success. Vast numbers of criminal offenders had been removed from English society in a humane way and on balance at little public expense and with no need for an elaborate administrative infrastructure. Furthermore, the forced experiments with the hulks revealed that it was politically feasible to put convicts to work in England (Branch-Johnson, 1957).<sup>10</sup> The idea of private prisons was also a natural outgrowth of 18th-century English practice more generally. In contrast to the Continent where central state formation commenced earlier, government in early modern England depended heavily on 'private' participation of all sorts. Indeed, it reveals that the distinction between 'public' and 'private' is shaped by context. Governance in early modern England depended upon 'private' parties to perform a host of public functions. Until well into the 19th century, local government in England depended heavily on unpaid justices of the peace to perform a host of judicial and administrative duties. In contrast to many locations on the Continent, there were few full-time public officials. The handful of those who did perform public service either volunteered their time or received fees for services rendered. Even those holding high national offices were not salaried and served out of a sense of *noblesse oblige*. Under the circumstances, private contracting constituted a natural practice.

Thus when the American Revolution brought transportation to an abrupt halt, the idea of a self-financing prison was there to replace it. Almost instantly contractors transformed surplus navel vessels into floating prisons which they then stuffed with hundreds of convicts in a single hold. The hulks, as these floating prisons came to be called, were used for more than 50 years, at first as a temporary measure, primarily to house convicts scheduled for transportation but occasionally as a form of sentence of their own. Once it was clear that the North American option was no longer feasible, the hulk contractors campaigned to transform this temporary arrangement into something permanent. They vigorously promoted the hulks as a workable alternative to transportation, developed plans to transform still more surplus navel vessels into floating prisons, proposed to build permanent facilities on shore, and pointed to a host of public works projects they had used convicts to build as evidence that their proposals were feasible. Although their grand plans did not come to fruition, the hulks were an integral part of British penal policy for decades. Convict laborers built and repaired harbors, docks and levies in port cities throughout England (Oldham, 1933; Branch-Johnson, 1957; *Reports on the General Treatment and Conditions of Convicts in the Hulks at Woolwich, with Minutes of Evidence, Appendices, and Index*, 1970 [1847]; McConville, 1981). The hulks never took root, but the idea of exploiting prisoners' labor to off-set costs did.<sup>11</sup>

Nowhere is the power of the appeal of the self-financing prison dependent upon prison labor operated by private contractors more clearly seen than in the efforts of Jeremy Bentham between 1780 and 1800. Well known for his plan for Panopticon, a

design of an efficient prison that allowed maximum surveillance at minimum cost, as well as his efforts to rationalize and codify the criminal law, Bentham is less well known for his effort to obtain a contract to build and operate a self-financing prison (Himmelfarb, 1968; Semple, 1993). Beginning in the 1780s and continuing on for over 20 years, Bentham campaigned tirelessly to obtain such an arrangement. He expected to reap huge profits from small fees paid by the Government and the productive labor of the convicts. To this end, he spent a small fortune and invested countless hours trying to acquire a suitable building site, perfecting the design for an efficient prison-factory, and courting influential friends to support his efforts. His voluminous correspondence with well-placed officials and all the influential criminal justice reformers of the day, extending over a period of more than 20 years, reveals that he was active in, indeed obsessed by the idea of, the quest for a monopoly contract to build and run this prison. He expected to become rich with this venture (Himmelfarb, 1968: 33; Semple, 1993).

Bentham failed in his personal quest, but his efforts did much to legitimate the idea of the prison and to convince reformers that it could be run as a business venture. At the time, neither of these were foregone conclusions. Many rejected the idea of prisons outright, opposed to the idea of treating 'free' Englishmen like caged animals. Some opposed the idea of the state providing room and board for the most undeserving segment of the population while doing nothing for the deserving poor. Others opposed the idea of imprisonment because of its cost. Bentham had a response for each of these objections. Prisons would be factories, not cages. Prisoners would not idle away their time; they would work and learn discipline, skills transferable to the outside, and thereby benefit both themselves and society. And because it would be a center of industry not a repository of idleness, the prison would cost the public little if anything. In part because of Bentham's effort, a skeptical government slowly came to embrace the idea of the prison. But it rejected Bentham's particular proposal to build and operate the prison himself. Instead, it chose to build and operate the prison as a government enterprise. Still, it was designed along the lines devised by Bentham, and attempted to operate as an income-producing business. Although he lost out personally, Bentham nevertheless had some considerable influence on the design and nature of the new enterprise. Indeed, the history of early English and American prisons is the history of the struggle to implement some form of Bentham's vision. These efforts eventually failed, but Bentham had had an effect. He developed its modern design, he helped shape the idea of the prison, and he helped convince a skeptical public of its value. Throughout the 19th century, his ideas continued to shape thinking in England and the United States, and were influential in France (O'Brien, 1982) and elsewhere.

In the United States support for Bentham's ideas was strong; the belief that prisons should be self-financing enterprises run by contractors was widely embraced. In his proposed 1834 *Code of Reform and Prison Discipline* for Louisiana, Edward Livingston, a disciple of Jeremy Bentham, developed a detailed plan covering every facet of prison management, including a provision that the warden's pay was to be determined in part by a 'percent of the gross amount of sales . . . of the articles manufactured in [the state's] prisons and also [a] percent on the amount of sums paid for the labour of the convicts by manufacturers' (Livingston, 1873: 591-2). Plans for prisons in other American states contained similar provisions. The earliest annual reports of the Auburn Prison in

up-state New York, focus almost obsessively on how to reduce costs and increase income in order to make the prison self-sustaining. Throughout the early part of the 19th century and even later, other states also expected their prisons to be self-financing. It was common for states to construct prisons and then turn them over to contractors to operate as businesses, with an expectation that the state would share in any surpluses. In other places, contractors were even required to finance the construction of the prisons themselves.

In 1825, Kentucky abandoned its costly, state-run prison after just a few years of operation, and turned the entire enterprise over to a private contractor who paid the state a fee for the right to lease the facilities and exploit convict labor in the market. The arrangement was a success; there were no scandals, the state did not pay for the upkeep of the prison or its inmates, and in some years it yielded a surplus for the state. There was fierce competition whenever the contract came up for renewal (McKelvey, 1977). In Tennessee in mid-century, prisoners were leased to work in coal mines, and the income was used to off-set costs. Elsewhere prisoners were employed in small-scale manufacturing (McAfee, 1987). And after the Civil War, several western states relied upon contractors to manage convicts. Nebraska, Kansas, and Oregon leased their prisons and prisoners to contractors for a small fee in exchange for the right to use the prison facilities and the convicts' labor (Lewis, 1922). In the wake of the population explosion brought about by the Gold Rush, the fledgling state of California turned to a private contractor to build its first prison at San Quentin and then operate it as a brick factory. In the late 19th century, and until well into the 20th, some southern states avoided building prisons altogether by relying on convict-lease systems. Convicts were turned over to contractors who used them to work on railroads, highways, and other public works projects, or who ran small-scale manufacturing, logging, turpentine production and farming operations. Well into the 1970s, some southern states continued to operate self-financing, and at times even profit-making prison plantations (Feeley and Rubin, 1998).

That these efforts eventually failed should not lead us to discount the power of the initial appeal when acceptance of the very idea of the prison was in doubt. As suggested above, conscience *and* convenience were present from the outset. It is therefore wrong to ignore or dismiss as unimportant Bentham's – and others' – ideas of the prison as a private, no- or low-cost institution. Reports of early Parliamentary Committees, testimony favoring construction of prisons, examination of the administrative structures, and reviews of financial accounts of early prisons all reveal a widespread belief, consistent with those of the entrepreneurs, that prisons could be run at a profit. The idea of housing and clothing a group of the most undeserving poor, indeed the most treacherous portion of society, did not come easily. It was anathema to a great many people of all political hues and classes, who looked around themselves and wondered why such benefits if they were to be dispensed at all, might not be directed at the deserving poor – honest laborers fallen on hard times, widows and orphans, and the like. The prison was not at all obvious. Despite the fact that the prison is now so much taken for granted that it has become synonymous with punishment, it was not always a foregone conclusion. What made it so appealing at the outset were the claims of entrepreneurs like Bentham – that prisons could be operated at no or low cost to the state.

## PARALLELS IN CONTEMPORARY PENOLOGY

Contemporary entrepreneurs who promote 'alternatives' to traditional custodial sentences and other advocates of 'privatization' represent a historical parallel. Transportation and the early prison reveal the success of entrepreneurs in creating new institutions that dramatically extend the reach of the criminal sanction. Similarly contemporary efforts to privatize are fostered by entrepreneurs who promote 'alternatives' that in fact expand the reach of the criminal sanction. In both eras, private contractors have played similar roles, as sources of innovation and energy to launch expansion. And, they have had much the same effects. To characterize these efforts merely as more efficient alternatives to existing institutions is to miss their primary significance. Their successes represent the institutionalization of expanded and new forms of social control. Just as historians of crime have tended to miss the important feature of these developments, and especially North American transportation, so too contemporary debates about privatization miss what may be its most significant feature.

I want to explore my quest for 'broad trends and recurring patterns' by examining several recent and well-known penal reforms. These efforts take a variety of forms but they have two features in common: they are promoted as more efficient and effective 'alternatives' to existing public agencies, and they are often privately operated. They are: private custodial facilities for juvenile; new types of 'community corrections' institutions for adults; and new forms of electronic surveillance technologies. All of these developments are typically described as improved and cost-effective alternatives to existing arrangements. Yet, each of them constitutes a significant extension of social control.

### Juvenile justice and 'community corrections'

Throughout much of the 20th century, the standard response of juvenile courts in the United States and elsewhere was to place those juveniles judged to be seriously delinquent in large-scale residential 'training schools' run by the state. These institutions were often little more than youth prisons; closed, heavily guarded, and offering little or no education or vocational training. Report after report revealed them for what they were, and by the late 1950s, a movement emerged to replace them with other more humane alternatives. Perhaps the most well-known and most successful attack on these training schools was mounted in the early 1960s by the then newly appointed Commissioner of Youth Corrections for Massachusetts, Jerome Miller. Having failed to gain support for his reform agenda from recalcitrant state unions representing correctional employees, in a single dramatic act Miller removed all but a handful of the wards from the state's training institutions. Literally overnight, he loaded them onto buses and placed them in empty dormitories at the University of Massachusetts until he found alternative housing for them. This dramatic story of removal is well known. What happened later is not so well known.

Miller's overnight victory against the training schools, and others' slower successes, led to an intense quest to find alternatives. The vacuum created by this shift was quickly filled by entrepreneurs who proffered any number of 'community' alternatives. Among those who responded most rapidly were private organizations already in the 'helping' business. They quickly expanded to absorb those directed away from the training schools. Under the banner of 'community corrections', Miller and others developed a new model for dealing with delinquent youths. They believed that all but the most incorrigible

delinquents should be housed in the 'community'. Various theories have been advanced to justify community corrections. They are cheaper alternatives. They are more effective alternatives. They are more humane alternatives. They are less likely to stigmatize youths. Whatever the precise reasons, one feature common to all these arguments is that they are 'alternatives'. However, they are much more. When the old-style training institutions in Massachusetts were closed, their wards were sent off to smaller, locally run and often privately run institutions. But so too were many others. Juveniles who once might have been placed on probation were also caught in this new net of custodial institutions (Scull, 1977; Krisberg, 1989).

Other states followed suit, although in not nearly such dramatic ways. Community corrections emerged as the solution to the obviously failed state training schools. Since the 1960s this movement has continued to grow, and almost everywhere the old-style state institutions have been abandoned and replaced by smaller, locally controlled 'alternatives'. These new institutions are notable for their flexibility. Small, usually privately operated by a mixture of for-profit and non-profit institutions, they are locally administered and can be adapted to various local circumstances and conditions, and designed for a variety of specialized clientele. Most are locally owned and operated. But there are a handful organizations that operate a number of separate facilities and programs across a state or even across the country. Each is run, in effect, as a franchise. In the aggregate, the programs are enormous. California, Florida, Massachusetts, Michigan, Pennsylvania, Rhode Island, and Washington, among other states, now rely extensively on contractors to house their wards. In many states, placement in privately run custodial programs constitutes the primary component of a state's juvenile corrections policy (Farbstein and Associates, 1988). In California, for instance, more than half of all juveniles in custody are housed in private community-based facilities.

It appears that states that rely heavily on private contractors also have higher rates of custody. For example, California and Washington, DC are among the national leaders in both custodial placements, as well as reliance on private contractors. Since the 1960s when the Massachusetts training schools were closed in favor of private community-based contractors, the rate of custodial placements in that state has grown (Krisberg, 1989; Feeley, 1999).

There is little doubt that on balance these new smaller-scale institutions are a marked improvement over the old system of large-scale training schools, at least for those who once would have been sent to state training schools. But it is a mistake to view them simply as 'alternatives'. Report after report has found that this new generation of programs confines juveniles, who prior to their creation would not have received custodial placements (Lerman, 1984; Blomberg, 1991; Blomberg and Luken, 1994).

The movement to privatize, as Patricia Ewick (1993) has shown, has generated still other innovations, private for-profit treatment programs that while ostensibly established for voluntary patients nevertheless reach out to 'serve' clients directed to them by the courts. Virtually nonexistent 25 years ago, private facilities designed to treat a host of pathologies – alcohol, drug abuse, and mental problems of all sorts – are now commonplace. Many depend on clients whose personal health insurance covers some or all the cost. These programs are also willing to receive still other clients, including those sent there by the courts. And some market their services for the not-yet-adjudicated; urging parents to send them their children who are in trouble with the law as part of a

strategy to get the court to drop charges altogether or if not, to ward off court-ordered placement somewhere else.

Despite their growing numbers and significance, this new range of community facilities and custodial treatment programs for juveniles are ignored in discussions of correctional privatization. This may be because many programs are regarded as 'service' or 'treatment' programs rather than punitive institutions, or that in a technical sense some of them are voluntary. Whatever the case, in the aggregate they represent a considerable extension of publicly sanctioned social control. In a review of developments in privatized corrections, Richard Ericson, Maeve McMahon and Donald Evans (1987) make a similar point. They liken such programs to franchises. 'In correctional franchising,' they observe, 'the state functions as the franchisor and the various nonstate correctional agencies as the franchisees,' which produces a 'dispersal of social control involving a complex web of state and nonstate interests, organizations, and social forces' (Ericson et al., 1987: 361). Such a process, they conclude, 'allows for the apparent decentralization of control of offenders, community involvement, and distancing from the state. In effect, however, it secures "publicization": centralized control of nonstate agencies through the conditions of contract and attendant monitoring and auditing functions' (1987: 362).

Perhaps these developments are beneficial. Perhaps more youths need to be under some form of publicly sanctioned control. However, these programs certainly are more than 'alternatives' to the institutions they are supposed to have replaced. And whatever their merits, they have been overlooked in the vigorous public debate over privatization, that has been framed almost exclusively in terms of cost-effectiveness and institutional legitimacy of adult correctional facilities. If the push in the United States to allow faith-based organizations to receive public funds to provide public services is successful, we might expect to see another dramatic expansion of social control that is also promoted in the name of 'alternatives'.

### **Community corrections for adults**

Although there is no comprehensive list, the numbers of low-security custodial facilities and intensive supervision programs – programs with such names as community work-release centers, work camps, pre-release centers, short-term detention facilities, restitution centers, return-to-custody centers, and residential treatment programs – have mushroomed in recent years. Over-shadowed by the dramatic expansion of the prison population, these programs for low-security 'community' custody and intensive supervision have in fact grown even more rapidly. Many of these programs are products of the 'community corrections' movement that began in the 1960s, although this term has receded into the background in this era of 'get tough' politics and as the programs have become institutionalized and no longer need a special label.

These programs provide a wide range of choices. At the low end of custodial confinement, they blend into the types of programs discussed under juvenile 'community corrections' in the section above. But at the deeper end, they appear to compete with full service prisons. Indeed, many of their proponents and others who embrace the idea of privatization tend to think of them as cheaper and more effective prisons. However, here too, it would be a mistake to think of all these adult custodial facilities as 'alternatives' to conventional public prisons and jails. There are simply too many types of institutions to fit within a single term. Many of them are various sorts of treatment facilities.

Some are low-security facilities designed to confine chronic nonviolent offenders. Others are 'half-way houses', imposed in lieu of a term in prison or as a transitional stage at the end of a prison term and before release. Although many states have embraced such privately run institutions as a way of coping with out-of-control prison population growth, in fact only a tiny fraction of these new programs are institutions for standard prison-bound offenders. Most reach more deeply into the probation and parole-bound populations. Evaluations of these programs reveal what studies of 'alternative' juvenile institutions have also found; although targeted for a prison-bound population, they routinely catch up those who otherwise would have received less restrictive sanctions. Such programs build on themselves. Since the 1980s, private contractors have become adept at responding to opportunities. The renewed popularity of drug treatment, despite a long history of failure, is likely to further expand such low-custodial programs.

A similar development has taken place for the not-yet-convicted. Not long ago, there was the stark alternative for those arrested and charged with a criminal offense: jail or bail. Now, a variety of low-security custodial and treatment institutions and forms of intensive supervision are available as 'alternatives' to pre-trial detention or money bail. In many American cities, judges at arraignment regularly condition pre-trial 'release' upon participation in drug and treatment programs. Others are released only on condition that they agree to intensive supervision and drug testing. These options were not routinely available 25 years ago. The proportion of arrestees out on bond prior to trial has not decreased, so too the proportion of those released on straight bond or promise to appear. Here too 'alternatives' to incarceration have impacted most heavily on those who once would have been released on less restrictive conditions. And here too many of these new alternatives are developed, promoted by and operated by private contractors who have responded to what they see as a new and needed market.

The 'deeper end' of corrections has also been affected by the creation of 'alternative' private prisons. These institutions have received the most attention, perhaps because they involve more serious offenders. At this 'deep end', Wackenhut, Corrections Corporation of America, and other large, heavily capitalized companies boldly assert that they want to 'take over prisons from the state' because they can run them more efficiently and effectively. These companies have made some considerable in-roads in the prison business, although they continue to face stiff resistance from a skeptical public and powerful public employee unions. Although Corrections Corporation of America failed in its bid in the 1970s and again in the late 1990s to obtain a contract to run the entire prison system in Tennessee (Hallett and Lee, 2001), private contractors operate prisons or jails in many if not most of the American states, and run a number of custodial facilities for the federal government, and the numbers of inmates they house continues to increase. Outside the United States, private prisons have been established or are under serious consideration in several countries in Europe, including the United Kingdom, and elsewhere. In Australia, in New South Wales, almost 10 percent of all prisoners are housed in privately operated facilities. Informed observers see these developments as a trend (Hallett and Lee, 2001; see more generally the articles in Shichor and Gilbert, 2001).

There is a wide range of types of facilities among these already established private prisons. But there are some striking features that set many of them apart from more traditional prisons. So far as this author knows, none of the new private prisons have been designed to house the highest risk prisoners. Indeed, the opposite is the case. Private

prisons have tended to focus on low-risk offenders, and many of them on a particular new type of low-risk offender. This appears to be a conscious strategy by private contractors. Rather than engage in direct competition with established correctional departments and powerful guards' unions, who actively oppose privatization, these companies have skirted the edge of the correctional function, seeking new niches at the margins.

Private contractors have been successful in building and operating several prisons in Texas, but they have been particularly successful in housing this new type of low-risk inmate. In the 1980s, confronted with a mushrooming prison population and a federal court order imposing limits on each of its prisons, the Texas Department of Corrections was forced to build a number of prisons in short order. Research revealed a new development that was exacerbating this problem. In the 1980s reliable and low-cost drug testing began to be routinely imposed as a condition of parole and probation. One consequence was that many newly released offenders were found to be in violation of their conditions of release and were returned to prison to serve out the balance of their terms. It was not clear whether more probationers and parolees were using drugs, but it was clear that routinized drug tests were catching more people. Once probation officers had the discretion to overlook some such violations, but with routine testing and systematic reporting systems, such discretion has been eroded. Now such violators are routinely returned to custody. Such 'technical violators' constitute a very high proportion of all new 'admits' to prisons. Indeed, such revocations now constitute a majority of all new entrants to prisons in Texas, California and many other large states. In Texas, this precipitated a crisis for the Department of Corrections and an opportunity for private contractors. Traditionally Texas housed all prisoners in maximum-security facilities. Such institutions, officials reasoned, are not necessary for offenders returned to custody to serve out the balances of their sentences, usually a few months at most. Such inmates are good risks, and because they will be in custody only a short time, do not require maximum-security, full-service prisons. Sensing a new need, private contractors devised an alternative, they proposed to build and operate low-cost, no-frills 'return to custody centers' designed especially for this new type of inmate (Feeley and Rubin, 1998: 66–95). Thus rather than competing with the Texas Department of Corrections to build and operate maximum-security prisons, Wackenhut and Corrections Corporation of America responded by providing a new type of facility.

Similar experiences elsewhere suggest that private prison companies are effective in identifying new niches. Traditionally the American Immigration and Naturalization Service (INS) had no need itself to detain illegal aliens, although occasionally it has turned to the Federal Bureau of Prisons. In recent years, however, private contractors have built and operate special detention facilities for the INS directly, and have found that their facilities have filled quickly. In post-9/11 America, this practice is surely bound to grow.

It is not clear how widespread this strategy of searching out new niches is, but it is clear that private prison contractors have been especially successful in sensing the demand for specialized facilities, and have responded accordingly. Like many other companies trying to break into established markets, where possible they have preferred to fill specialized and new niches rather than compete head-on with established correctional departments. Here, as in business generally, an incremental approach responding to new needs seems to be paying off.

### New surveillance technologies

A number of companies have developed electronic devices and software to monitor the movement of individuals. Originally designed as aides to help keep track of sick and the elderly frail, these devices were quickly picked up by probation departments for remote surveillance of clients. The technology is such that electronic devices can now easily provide continuous surveillance of large numbers of people. These devices function somewhere between the bricks and mortar of the prison on the one hand and the discipline imposed by the helping professions on the other. Furthermore, electronic surveillance holds out the promise of overcoming the shortcomings of both (Friel et al., 1987). They are less expensive than the prison and more reliable than the self-discipline fostered by the helping professions. Furthermore, they are infinitely flexible. Electronic sentences can require the subject to leave for work by 7 am, be home by 6 pm, appear for scheduled drug tests, and not to deviate from a prescribed route and schedule. If something out of the ordinary occurs, an alarm is tripped. Foucault's vision of the auto-discipline fostered by the helping professions can now be supplemented with an electronic helping hand.

Still in its infancy, this technology has potential that is as great as transportation and prisons when they were first developed. Indeed, a similar trajectory for this development may already have been established. Proclaimed as an alternative to imprisonment, electronic monitors are almost invariably used to supplement probation or monitor those awaiting trial, on people who otherwise would have been released on less restrictive conditions. Although electronic monitoring may emerge as a much less expensive alternative to prison, it is clear that it will also (continue to) be used in the same way transportation was – to expand social control.

There is another feature of this development, at least in the United States. Frustrated by sluggish and unresponsive probation departments, companies that once sought only to sell or lease new equipment have expanded into direct services. They want to operate direct monitoring on a contract basis for sheriffs' departments and probation agencies. It is too early to tell, but it may be that once technical difficulties are overcome, electronic monitoring will emerge in the 21st century to become what transportation was in the 18th and prisons were in the 19th. It may open a vast new form of punishment, one that blends surveillance and confinement, and can be applied to a much larger segment of the population than is now subject to imprisonment. Indeed, private probation companies may come to replace public probation departments, even as electronic monitoring dramatically redefines the traditional functions of probation. This may not be some far-fetched idea. In the United States the numbers of those on probation and parole far exceed those in prison. If only a small portion of those now on probation or released prior to trial are subjected to electronic monitoring, the reach of the state will be vastly expanded.

### CONCLUSION

This article has examined two quite different sets of innovations in criminal justice that are separated by one hundred years or longer. Transportation and the birth of the modern Anglo-American prison all emerged 200 or more years ago. Community-based corrections, return-to-custody centers, and electronic monitoring are still in their infancy. What links them together, however, is that they are all products of, or were significantly

shaped by, entrepreneurs who promoted them as cheaper or more effective 'alternatives' to existing forms of punishment.

My purpose in linking them together is to underscore a feature that is altogether missing in the contemporary debate about privatization. Current debates revolve around two questions: Are private contractors more efficient than public agencies? And, is it ethical to assign the task of public punishment to private business? These are obviously important questions, but my purpose here has been to address still another, even more important question: Does privatization expand social control? The evidence suggests that it does. I have shown that the history of private contractors in criminal justice is not simply a process developing replacements for outmoded institutions. Rather, privatization fosters entrepreneurs who innovate. Privatization has been successful because it leads to new institutions that expand the state's capacity for social control. Its distinct appeal is that it can do this at no or low cost. Its consequences are that many of these activities form a network of nearly invisible centers of control. What occurred in the 18th century at one formative period of the criminal justice system, and again in the 19th century, appears to be repeating itself today.

### Notes

This article is a revision of a paper prepared for presentation at the annual meeting of the Law and Society Association, Budapest, 4–7 July 2001, and an earlier version presented at the Policy History Conference, Bowling Green, Ohio in May 2000. It is also part of a larger project in the policy history of privatization in criminal justice. I appreciate helpful comments of Sarah Armstrong, Sharon Dolovich, David Garland, Peter Linebaugh, David Nelken, Richard Sparks, and David Shichor. Needless to say, only I am responsible for errors.

- 1 For a critical review of the positive assessment of privatization of corrections, see Camp and Gaes (2001).
- 2 This literature is presented and carefully reviewed in the various essays in Shichor and Gilbert (2001).
- 3 There is a similar account to be told about privatization of security and policing which this study does not explore, in part because the analysis of the consequences and implications for private police and security have been the subjects of a great deal of thoughtful examination. See, for example, Shearing and Stenning (1987).
- 4 Consider New York City, where the most creative and innovative changes in that city's criminal courts have, by consensus, emerged from the Vera Institute, a private not-for-profit organization that has as its self-appointed task the improvement of New York's courts. After years of successful operations, it is now regarded almost as an adjunct of the City's criminal justice system. In effect it is an R&D unit in an organization that lacks its own.
- 5 In a careful study Philip Jenkins (1990) has traced the decline of executions in England between 1600 and 1900, and related them to transportation. He is correct to argue that transportation must be considered as a significant punishment in its own right rather than a temporary form of punishment used briefly between the regimes of the death penalty and the prison. Despite his own figures suggesting the contrary, however, he seems to believe that transportation was an 'alternative' to capital punishment. His

own figures reveal that executions declined precipitously *before* transportation ever came to be widely imposed. Still, his study does reveal that transportation was a separate, distinct, and long-standing form of punishment in its own right.

- 6 Between 1718 and 1776, the Home Office entered into various arrangements with shippers to transport felons to North America. Throughout the period the bulk of income received by these shippers came from sale of convicts into limited-term slavery. However in order to assure that shippers would not only take young men who would fetch a high price, but also would take women, youths, old people, and cripples, shippers negotiated a subsidy from the Home Office, conditioned upon their taking all convicts assigned to them. Transportation proved to be so profitable, however, that in mid-century the Home Office was able to eliminate the £5 subsidy in 1767 and still insist that shippers take all who were assigned to them.
- 7 There are important exceptions. See Oldham (1933); Branch-Johnson (1957); Smith (1965), all discussed in Feeley (1999).
- 8 Pieter Spierenburg is persuasive that the modern prison – an institution designed for the punishment of offenders by confining them for long periods of time – has its origins in various types of institutions of confinement that emerged much earlier, and in general earlier on the Continent than in England and North America because stronger governments emerged on the Continent earlier. See Spierenburg (1991: 1–5) arguing against the chronology implicit in the works of David Rothman (1971), Michael Foucault (1975) and Michael Ignatieff (1978).
- 9 None of these ideas were wholly new. As Sellin (1976), Pike (1983), Rusche and Kirchheimer (1968 [1939], Melossi and Pavarini (1981)) and other historians of punishment have shown, the state has long sought to exploit the labor of criminals. However much of the earlier exploitation of prison labor on the Continent involved convicts being pressed into work overseen by public officials, as oarsmen on navel galleys, working in state-owned mines, and constructing public works overseen by the militia.
- 10 To be sure there were a great many critics of the hulks, owing in large part to their high mortality rates (Branch-Johnson, 1957).
- 11 In contrast to accounts of the development of the prison in England and the United States which emphasize the idealism of most of the reformers, standard accounts of the history of continental prisons emphasize the various ways officials sought to offset the costs of maintaining convicts – as oarsmen on galleys, building public works in Southern Europe and North Africa, slave-like labor in mines in central and northern Europe, and small-scale crafts and manufacturing in the low countries (Sellin, 1976; Pike, 1983; Spierenburg, 1991).

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MALCOLM M. FEELEY is Claire Sanders Clements Dean's Professor in the Jurisprudence and Social Policy Program at Boalt Hall School of Law at UC Berkeley, and during 2001–2, Fellow at the Center for Advanced Study in the Behavioral Sciences. He is the author of numerous books and articles. *The process is the punishment* received the ABA's Silver Gavel Award in 1980, and a citation from the American Sociological Association. His most recent book (with Edward Rubin) is *Judicial policy making and the modern state: How the courts reformed America's prisons*. His recent articles have focused on actuarial justice and the history of criminal justice administration. He is currently working on a book on women and crime in 18th-century Europe.

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